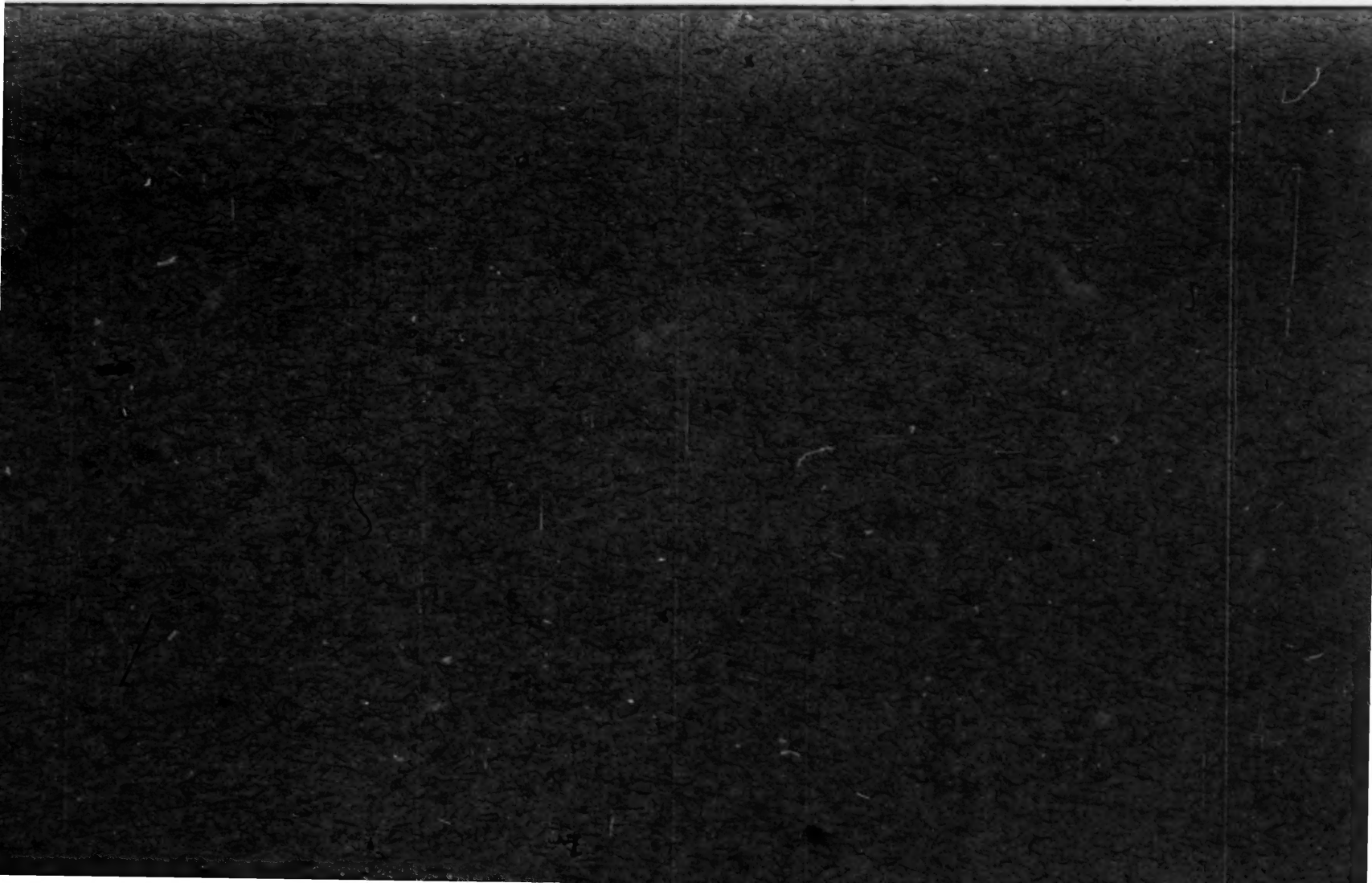

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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1025

THE LAIDLAW CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-47) [1] is reported at 414 F. 2d 99. The Board's decision and order (A. 23-94) are reported at 171 NLRB No. 175.

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[1] "Pet. App." refers to the appendices bound with the petition. "A." refers to the separate Appendix filed with the petition. "E." refers to those portions of the testimony and exhibits printed in the two volumes labeled Exhibits in the court below. "Tr." refers to the original transcript of the testimony.

## JURISDICTION

The judgment of the court of appeals was entered on September 25, 1969 (Pet. App. 48-49). On December 19, 1969, Mr. Justice Douglas extended the time in which to file a petition for a writ of certiorari until December 31, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Board, having found that the employer discriminated against certain striking employees in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, properly ordered the employer not only to reinstate those employees to their former jobs but also to reimburse them for their lost earnings.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 50.

## STATEMENT

### A. The Board's Findings of Fact

In June 1962, the International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO, was certified as the collective bargaining representative of the Company's production and maintenance employees at its Peru, Indiana plant. Since that time the Company and the Union have been parties

to successive collective bargaining agreements, the most recent of which ran from December 14, 1964, to December 13, 1966. In the late fall of 1965, the Union notified the Company of its desire to reopen the latter contract to renegotiate wages;[2] the Company agreed, and the parties met at various times in the months of December 1965 and January 1966. The Company refused to offer any increase in wages, and, on Saturday, January 8, 1966, the employees voted to strike in support of their demand for a wage increase. (A. 25, 35-40, 51; R. 29-32.) On January 10, the Union sent the Company a telegram notifying it of the employees' decision (A. 40, 51, 85; E. 33). That day, Krile, a foreman, told Lemke, an employee, that he did not know that she belonged to the Union; Krile added that he:

> didn't think there was enough that belonged to the union that could do any good [, that] there were only four or five in his department that belonged to the union and he had orders to replace them. [A. 70-71; Tr. 277.]

On January 11, the Union sent the Company another telegram stating that the strike would begin at noon the next day (A. 41). Also on January 11, foreman Krile told employee Good that "it won't do you a damn bit of good to go [on strike] because by the very next morning every damn one of you will be replaced" (A. 71; E. 215). That afternoon, plant manager Johnston read a prepared speech to

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[2] The contract contained a provision permitting mid-term negotiations with respect to wages (A. 25).

about 75 or 80 of the Company's employees gathered in the lunch room, which included the following statements:

> The Company has decided to continue to operate through the strike, and in doing so will provide work for all employees who decide to work and will hire new employees to replace those on strike.
>
> Mr. Wentz has told those of you at the Union meeting last Saturday that our attorney Mr. Duck lied to you on last Friday when he told you that under Federal Law if you do go on strike and the Company hires a replacement for you you *Lose Forever* your right to employment by this company. I want to assure you that such *IS* the law. Mr. Duck told you the absolute truth. Let me suggest that before you take action that can seriously and permanently effect your future here, you check with any lawyer of your own choice or with the Indianapolis Office of the National Labor Relations Board. You will find Mr. Wentz has misled you and Mr. Duck has told you the absolute truth. [A. 70, 85; E. 242, emphasis in original text.]

On January 12, shortly before noon, foreman Krile told employee Miller that the employees "could be replaced," that the "Company already had applications, and had already hired [your] replacement" (A. 71; Tr. 281). At noon, approximately 70 of the Company's 99 bargaining unit employees went out on strike (A. 41, 51; E. 268). As employee Durham was leaving the Company's building to join the

strike, Buttram, another foreman, told her "the Company could afford to go into the hills and get cheap hill billies for cheap transportation and they would cross the picket lines and that we would be replace[d]"; he added, "it has been good to know you" (A. 70; E. 81).

On January 21, William Massey, a long-time employee of the Company, went out on strike and walked on the picket line with the other employees (A. 52, 85; E. 56-57). Two days later, he telephoned his supervisor, Bob Bridges, and asked to return to work (A. 52, 85; E. 57-58). Massey was told to report at 7 o'clock the next morning (A. 52; R. 58). When Massey arrived, he was told by trainee employment manager Grayson that his job, as well as the jobs of all male employees, were "filled" at that time (A. 85, 52; E. 59). Grayson added that, if the Company were to re-employ Massey it would be as a "new employee" at the minimum contract starting salary of $1.89½ per hour (A. 52, 85; E. 60-61).[3] Three days later, Grayson telephoned Massey and asked him to return to work. Grayson promised Massey the same pay he was receiving when he went on strike, but said he "would have to be reinstated as a new employee" (A. 52-53; E. 59-60). Massey refused to return to work on those conditions, and continued to picket (A. 53, 85).

During the strike, plant manager Johnson told foreman Bridges that they should replace the strikers "as fast as we can" to get rid of the employees

[3] When the strike began, Massey was earning $1.99½ per hour (A. 85, 52; E. 57, 182).

with the most seniority because they were the "troublemakers" (A. 67; Tr. 118).

On the evening of February 10, approximately 50 of the striking employees met and voted to abandon the strike and return to work (A. 85; E. 41-44). The following morning, Union representative Rains and about 40 strikers appeared at the plant; Rains made an unconditional offer to return to work on behalf of all the striking employees (A. 85; E. 45, 135-138). Additionally, each of the employees present tendered a written form letter making such an offer (A. 85, 59; E. 45, 135, 268). Following a telephone conversation with the Company's attorney, Johnston read the following statement to the gathered employees (A. 85, 59; E. 46, 136-137, 189):

> Many of you have been permanently replaced and are not entitled to reinstatement. As soon as we can determine if there are job openings today, those of you for whom there are such openings, if any, will be notified on or before Monday to report to work.

Thereafter, the Company determined that, as of February 11, all but five of the strikers had been replaced and hence only five employees were needed to bring the work force up to pre-strike levels (A. 85, 86, 64; E. 199-202). Accordingly, five of the striking employees were notified by telegram of the vacancies and offered reinstatement (E. 204).

On February 15, the Company received five additional requests for reinstatement from striking employees. Again, the Company checked its requirements and determined this time that it had nine open-

ings. It sent employment offers to all five of the strikers who had applied that day. The other four openings were "filled with new hires," whose applications the Company had "on file." (E. 206, 210.) In deciding how to fill these four openings the Company gave no consideration to the applications of the striking employees who had sought work on February 11 (A. 60, 86; E. 142-144, 183, 206). According to plant manager Johnston: "We were handling this on the basis of the dates they applied for reinstatement," and "if they didn't apply on the right day [the Company was not] going to call them the next day, so to speak" (A. 86; E. 186).[4]

On February 16, the Company received four more requests for reinstatement from strikers, but, since it had no openings at that time, made no offers of reinstatement (E. 146-147). The same day, however, the Company began mailing to the Indiana Employment Security Division printed "termination" notices, setting forth the "date of separation" of each striking employee to whom it had not offered reinstatement. Each notice stated, "This person permanently replaced while on economic strike and no job available on _____, date of application for reinstatement." Copies of these notices were also sent to each affected employee. (A. 60, 86-87; E. 190-191, 266.)

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[4] The Board found that this policy was "newly inaugurated after the strike" (A. 86). Thus, plant manager Johnston testified that, while the plant followed seniority in all departments, "we worked out the first and foremost [policy] after the walkout" (E. 186).

On February 18, the Company received three more applications for reinstatement (E. 147-148). Johnston again reviewed the Company's personnel needs for that day and determined that four jobs were available (E. 148-150). The three employees whose applications were received that day were offered reinstatement (A. 60). Again, none of the strikers whose applications for reinstatement had been received on previous days was considered for the additional vacancy. Rather, the job was filled with a new employee. (E. 150.)

During the week of February 14 to 18, the employees who were not reinstated continued to picket outside the Company's premises with signs stating that the Union was on strike (A. 60-61; E. 49-50, 55). On February 20, a group of approximately 11 employees who had been reinstated or offered reinstatement met with Union representative Rains to protest the Company's action in terminating many of the strikers and in failing to reinstate strikers despite job openings (A. 87, 61; E. 51-52). Rains told the employees that they had the right to file unfair labor practice charges, and to continue to strike. The employees decided that they would "go on strike under the sign of an unfair labor [practice] strike." (A. 87, 61; E. 52.) The next day, February 21, the picket signs were changed to read, "Local 681 International Brotherhood of Pulp and Sulphite on strike protesting unfair labor practices" (A. 71; E. 55).[5]

[5] Also on February 21, the Company received four more applications for reinstatement. The Company discovered that it had four vacancies and offered the four applicants reinstate-

After February 21, the Company continued to advertise for new employees, as it had done from the beginning of the strike. The advertisements were still running at the time of the Board hearing in April.[6] From February 12 to March 31, the Company hired about 50 new employees (A. 62, 68; E. 258-261). During that period it reinstated or offered reinstatement to only 18 strikers (A. 60, 66).

### B. The Decisions Below

The Board held, *inter alia*, that the Company violated Section 8(a)(3) and (1) of the Act by terminating the employment status of strikers whose jobs

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ment. Each, however, refused and joined in the picketing with the other employees. The Company received no more applications for reinstatement after this date (A. 60-61, 87; E. 154).

[6] The advertisements read as follows (A. 68; E. 11-12, 262):

NOTICE NOTICE

HELP WANTED

WE HAVE PERMANENT JOBS FOR ANY "MEN" OR "WOMEN" INTERESTED. HIRING WHILE JOB OPENINGS ARE AVAILABLE.

APPLY LAIDLAW CORP.
175 WASHINGTON AVE.
PERU, INDIANA
PHONE: 473-4468

OUR MANY BENEFITS INCLUDE PAID VACATIONS, HOLIDAY PAY, INSURANCE, TIME AND HALF ON SATURDAYS, AND DOUBLE TIME ON SUNDAYS.

WE PRACTICE EQUAL EMPLOYMENT OPPORTUNITY

"HAVE YOU SEEN THE PICKETS?"
WE ARE *NOT* A CLOSED SHOP.

NOTE: Unskilled Female Help 1.49½ per hour.

were held by replacements on the date they applied to return to work, instead of recalling them as vacancies arose. The Board's holding rested on alternative grounds. First, the Board found that the Company's action was motivated by animus against the strikers for their strike activity (A. 66-68, 88, 93).[7] Second, the Board held that, even absent a bad motive, the Company's action in failing to recall the strikers as vacancies arose was inherently discriminatory, that the Company lacked a substantial business justification which would privilege such discrimination, and that the Company's action was thus unlawful under the principles enunciated in *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (A. 88-93).

The Board ordered the Company to cease and desist from the unfair labor practices found, and from otherwise interfering with, restraining or coercing its employees in the exercise of their Section 7 rights. The Board also ordered the Company, *inter alia*, to offer Massey and the 50 other strikers whose employ-

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[7] This finding was based on foreman Krile's statement to employee Lempke that he had orders to replace the union members in his department; plant manager Johnston's warning to the employees that anyone who went out on strike and was replaced would "Lose Forever [his] right to employment by this company"; Johnston's statement to foreman Bridges that they should replace the strikers "as fast as we can" to get rid of the employees with the most seniority because they were "troublemakers"; and the fact that, although there was a large turnover among the nonstrikers and strike replacements, the Company did not recall any striker who had been replaced despite his continued availability for a job, but instead hired a substantial number of unskilled new employees (A. 66-68, 87-88).

ment was terminated immediate and full reinstatement, with backpay from the dates on which the Company should have hired them as their jobs became available; to offer the reinstated employees who resumed striking on or before February 21 immediate and full reinstatement upon their unconditional offer to return to work;[8] and to post appropriate notices (A. 76-82, 93-94).

The court of appeals, with one judge dissenting, sustained the Board's findings and conclusions, and enforced its order in full (Pet. App. 1-47).

## ARGUMENT

Petitioner does not appear to challenge (see Pet. 9 n. 8, 12) the propriety of the Board's conclusion, sustained by the court of appeals, that it violated Section 8(a)(3) and (1) of the Act by terminating the employment status of striking employees merely because their jobs were filled by replacements on the precise day that they applied for reinstatement and by hiring unskilled new employees in preference to the strikers when vacancies occurred shortly thereafter. Petitioner's basic contention is that the Board's conclusion rests on principles which were first enunciated in *National Labor Relations Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375, decided after the Company's action, and that, in these circumstances,

[8] The Board found that the strike continued after February 11 due to the Company's unfair labor practice in terminating strikers, and that thus those strikers who rejected offers of reinstatement and rejoined the strike became unfair labor practice strikers on and after February 21 (A. 68, 88).

it is unfair and arbitrary to impose a backpay liability on the Company. However, it is unnecessary to reach this issue here, for the Board's unfair labor practice finding also rests on an alternative ground —that the Company was motivated by animus against the strikers. The latter ground is the classic basis for a finding of unlawful discrimination, established long before *Fleetwood;* it alone is sufficient to support the Board's backpay order.

Contrary to petitioners' argument (Pet. 12, n. 10), the Board's alternative finding that the Company's failure to reinstate strikers was discriminatorily motivated is distinct from its rationale based on *Fleetwood,* and has ample evidentiary support. As the court below noted (Pet. App. 17), statements by Company supervisors revealed that the Company had tailored its new hiring policy deliberately to eliminate the strikers. "This evidence," the court added, "when considered with the fact that not one striker who had been replaced was recalled and in light of the company's advertising for permanent unskilled help and its hiring of approximately fifty new employees to fill vacancies, is sufficient to establish a prima facie showing of unlawful motive," which the Company failed to rebut (Pet. App. 17-18).

But, even if the Board's backpay order here could only be sustained on the new *Fleetwood* rationale, it does not follow that such an order was improper. As the court below pointed out (Pet. App. 19), "retroactivity 'must be balanced against the mischief of producing a result that is contrary to a statutory design [or] to legal and equitable principles,' " quoting

from *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203. In this case, the court concluded, "the importance of protecting the statutory rights of Laidlaw's employees outweighs the fact that the company may have relied on a prior Board rule or policy" (*ibid.*). Cf. *National Labor Relations Board* v. *Rutter-Rex Mfg. Co.*, No. 32, O.T. 1969, decided December 15, 1969, sl. op., pp. 6-7.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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